Kho Ah Soon v Duniaga Sdn Bhd

FEDERAL COURT (ALOR SETAR) — CIVIL APPEAL NO 02-475-91
CHONG SIEW FAI CJ (SABAH & SARAWAK), PEH SWEE CHIN AND WAN ADNAN FCJJ
10 FEBRUARY 1996

Land Law *— Restraint on dealings — Caveat — Land dispute — Entry of caveat pending trial — Application for removal of caveat by opposing party — Onus of caveator — Whether there existed serious question to be tried — Whether better to maintain status quo until trial of dispute on balance of convenience*

The respondent ('Duniaga') had granted an option to sell certain lands ('the land') for RM410,000 to a Mr Tan Boon Seng ('Tan'). Tan had, in turn, granted a sub-option to the appellant ('Kho') to buy or to sell the land for RM580,000. Kho alleged that he had exercised his option to buy the land at RM580,000 by sending a letter to Duniaga through his solicitor, and that Duniaga had duly acknowledged receipt of it. Duniaga later refused to sell the land to Kho, and it followed that Kho sued for specific performance of the alleged agreement ('the civil suit'). Meanwhile, Kho had lodged a private caveat against the land. Duniaga applied to the High Court for its removal. The High Court decided in favour of Duniaga on the ground that there was no serious question for trial. It was further held that the caveat should be removed because Kho had no cause of action against Duniaga as there was no privity of contract between the parties; the letter of acceptance allegedly posted by Kho was never received by Duniaga; and that Tan had no authority to issue the sub-option to the caveator at a price other than the price of RM410,000 ('the disputed issues'). Kho appealed.

Held, allowing the appeal with costs:

(1) It is settled that in a matter of removal of a caveat as between a caveator and caveatee, the onus is on the caveator to satisfy the court that his evidence does raise a serious question to be tried with regard to his claim to an interest in the land in question, and having done his claim so he must show that, on a balance of convenience, it would be better to maintain the status quo until the trial of the action by preventing the caveatee from disposing of his land (see p 184F–H); *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 and *American Cyanamid Co v Ethicon* [1975] AC 396 followed.

(2) The disputed issues in this case should not and could not be used by the lower court to decide the fate of the motion. A court should decide only on consideration of undisputed facts in affidavits and not on credibly-denied allegations in the absence

of oral evidence and cross-examination (see p 187B–C); *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 followed. A

(3) In this case, there were indeed serious questions for trial, such questions not being frivolous or vexatious, and that the civil suit ought to be allowed to be heard without it being rendered futile by the removal of the private caveat in question. The private caveat ought to remain until the disposal of the civil suit for maintaining the status quo (see p 187F–G). B

[Bahasa Malaysia summary

Penentang ('Duniaga') telah memberi suatu opsyen untuk menjual tanah tertentu ('tanah tersebut') pada harga RM 410,000 kepada seorang bernama Encik Tan Boon Seng ('Tan'). Tan pula telah memberi suatu sub-opsyen kepada perayu ('Kho') untuk membeli atau menjual tanah tersebut pada harga RM580,000. Kho mengatakan bahawa dia telah melaksanakan opsyennya untuk membeli tanah tersebut pada harga RM580,000 dengan mengirim sepucuk surat kepada Duniaga menerusi peguamcaranya, dan bahawa Duniaga telahpun mengakui penerimaan surat itu. Duniaga kemudiannya enggan menjual tanah tersebut kepada Kho, dan ekoran itu, Kho telah menuntut pelaksanaan spesifik perjanjian yang dikatakan itu ('guaman sivil tersebut'). Sementara itu, Kho telah memasukkan suatu kaveat atas tanah tersebut. Duniaga telah memohon kepada Mahkamah Tinggi untuk pembatalan kaveat tersebut. Mahkamah Tinggi telah membuat keputusan yang memihak kepada Duniaga atas alasan bahawa tidak terdapat persoalan serius untuk perbicaraan. Selanjutnya, adalah diputuskan bahawa kaveat tersebut patut dibatalkan sebab Kho tidak mempunyai sebarang kausa tindakan terhadap Duniaga oleh kerana tiada priviti kontrak antara pihak-pihak; surat penerimaan yang dikatakan telah dikirim oleh Kho tidak pernah diterima oleh Duniaga; dan bahawa Tan tidak mempunyai autoriti untuk mengeluarkan sub-opsyen kepada pengkaveat pada suatu harga selain daripada harga RM410,000 ('isu-isu yang dipertikaikan'). Kho merayu. C D E F G

Diputuskan, membenarkan rayuan dengan kos:

(1) Adalah mantap bahawa dalam suatu perkara pembatalan kaveat di antara pengkaveat dengan penanggung kaveat, beban terletak atas pengkaveat untuk memuaskan mahkamah bahawa keterangannya sesungguhnya menimbulkan suatu persoalan serius untuk dibicarakan berhubungan dengan tuntutannya untuk kepentingan atas tanah yang berkenaan, dan selepas berbuat demikian dia mesti menunjukkan bahawa, atas imbangan kemudahan, adalah lebih baik jika statuts quo dikekalkan sehingga perbicaraan tindakan demi menghalang penanggung kaveat daripada melupuskan tanahnya (lihat ms 184F–H); *Eng Mee* H I

A *Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 dan *American Cyanamid Co v Ethicon* [1975] AC 396 diikut.

(2) Isu-isu yang dipertikaikan dalam kes ini tidak patut dan tidak boleh digunakan oleh mahkamah di bawah bagi memastikan nasib usul itu. Sebuah mahkamah harus membuat keputusan
B hanya atas pertimbangan fakta-fakta yang tidak dipertikaikan dalam afidavit dan bukan atas pengataan nafian yang boleh dipercayaai dalam ketiadaan keterangan lisan dan pemeriksaan balas (lihat ms 187B–C); *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 diikut.

C (3) Dalam kes ini, sesungguhnya terdapat persoalan serius untuk perbicaraan yang tidak remeh atau menyusahkan, dan guaman sivil tersebut patut dibicarakan tanpa disia-siakan oleh pembatalan kaveat sendirian berkenaan. Kaveat sendirian itu harus dibiarkan sehingga penyelesaian guaman sivil tersebut bagi mengekalkan
D status quo (lihat ms 187F–G).]

Notes

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2241–2419.

E

Cases referred to

American Cyanamid Co v Ethicon [1975] AC 396
Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212
Goldsbrough Mort & Co Ltd v Quinn (1910) 10 CLR 674
F *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433

Legislation referred to

Contracts Act 1950 s 2(d)

G **Appeal from:** Originating Summons No 25–46–90 (CT 1)(High Court, Pulau Pinang)

Maikal Yasu & Murali (*Anwar & Maikal*) for the appellant.
VM Mohan & Cheong Ying Wei (*JB Lim Suhaimi & Khaw*) for the respondent.

H

Cur Adv Vult

Peh Swee Chin FCJ (delivering the judgment of the court): This is an appeal by the defendant Kho Ah Soon, against an order dated 28 October
I 1991 of the Penang High Court ordering the removal of a private caveat No 5853/89, Jilid 207, Folio 56 dated 3 November 1989 lodged by the defendant against certain lands described therein, the said order having

been made in pursuance of a notice of motion No 25–46–1990 dated 9 July 1990. A

The order appealed from has never been extracted and in the said notice of motion, the plaintiff had asked for, in addition to the removal of the said private caveat, another order for the setting aside of yet some other order made in some other originating summons, ie the Originating Summons No 24–55–1990. B

The prayer for setting aside that other order was not mentioned at all in the relevant notes of proceedings (pp 63–65 of the appeal record), and from the said notes, the court below merely made an order to the effect that the said private caveat be removed (p 64) that the caveator do pay compensation to be assessed by the senior assistant registrar (p 65), and that leave to appeal be granted (p 65). We will, therefore, confine ourselves to dealing solely with the order of removal of the private caveat aforesaid (the plaintiff in this notice of motion is hereinafter called 'the caveatee' and the defendant, 'the caveator'). C

It is common ground that the said private caveat is connected with a pending civil suit, being Penang High Court Civil Suit No 22–28–1990 in which, briefly, the caveator is the plaintiff and the caveatee, the first defendant; and in which the caveator has sued for specific performance of an alleged agreement with the caveatee for the latter to sell and the caveator to buy the lands against which the private caveat herein was lodged in the first place. The second defendant in that civil suit is alleged to be an 'option holder' for the sale of the said lands in respect of such an option from the caveatee while the third defendant is alleged to be a party in conspiracy with the other co-defendants to 'defraud and injure' the plaintiff. D E

It is settled that in a matter of removal of a caveat as between a caveator and caveatee, as in the instant appeal, the onus is on the caveator to satisfy the court that his evidence does raise a serious question to be tried as regards his claim to an interest in the land in question, and having done his claim so he must show that, on a balance of convenience, it would be better to maintain the status quo until the trial of the action by preventing the caveatee from disposing of his land, as laid down by Lord Diplock in *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212, and by analogy indirectly to *American Cyanamid Co v Ethicon* [1975] AC 396 as indicated by Lord Diplock, the serious question for trial referred to above could mean a question not being vexatious or frivolous. F G

The court below did bear in mind correctly the case of *Eng Mee Yong* but had ordered the removal of the said private caveat because, to quote: H

> ... when ordering the removal of the caveat, I had thought that the option, being unsupported by consideration, was unenforceable (see s 2(d) of the Contracts Act 1950). I

In the grounds of judgment of the court below, the said court stated that it recognized that the said option could still be good as an offer and that

such an offer, if accepted before its revocation, could give rise to a contract, citing *Goldsbrough Mort & Co Ltd v Quinn* (1910) 10 CLR 674 at p 691.

The caveatee had given the option to the second defendant, one Tan in the above-mentioned civil suit (hereinafter called 'Tan'), ie an option to sell the said lands for RM410,000 and allegedly the caveator had exercised his option to buy the said lands at RM580,000 by a letter allegedly sent in the nick of time and dated 26 September 1989 through his solicitor to the caveatee who was alleged to have duly acknowledged receipt of it. The caveator alleged that, alternatively, the said Tan had assigned the said option he held of the caveatee to him by means of a sub-option to the caveator who allegedly has exercised the sub-option too.

The said option and the said sub-option are set out below for ease of reference:

Option

Kompleks Chain Ferry
4656, 4657 Tingkat Bawah
Jalan Chain Ferry
12100 Butterworth, PW

Tel No: 342506/343672

Duniaga Sdn Bhd
Perniagaan Dalam Bidang Pembangunan Perumahan

Bil Tuan:
Bil Kami:

12 September 1989

Mr Tan Boon Seng (NRIC No 0304552)
No 1 Lorong Haruan Satu
Supreme Garden
13700 Prai

Dear Sir

Option To Sell

An option is hereby given to Mr Tan Boon Seng, No 0304552 of No 1, Lorong Haruan Satu, Supreme Garden, 13700 Prai to sell the following property known as lot no PT 2364 & PT 2365, Mukim 11, Seberang Perai having a total land area of 42,147 sq ft for a consideration sum of RM410,000: four hundred and ten thousand only, payable as follows:

1 10% deposit upon execution of the sale and purchase agreement.

2 The balance of the purchase price to period within 3 months upon the execution of the sale and purchase agreement.

This option is valid for a period of 14 days from the date hereof. The commission to be paid by us is RM18,000: eighteen thousand, and payable on execution of the sale and purchase agreement of the above property.

Thank you.

Yours faithfully,
Duniaga Sdn Bhd

—Sgd—
(Ishak bin Kamaruno)
General Manager

Sub-Option

I, Tan Boon Seng (NRIC No 0304552) of No 1, Lorong Haruan Satu, Supreme Garden, 13700 Prai do confirm that I have been given an option to sell the undermentioned pieces or parcels of land by the registered owners of the said land namely Duniaga Sdn Bhd.

The option granted to me expires on 26 September 1989.

I do now grant a sub-option to sell or to buy the said land to Mr Kho Ah Soon (NRIC No 3649026) of 491, Sungai Rambai, Bukit Mertajam, PW at a price of RM580,000 (for both pieces of land).

This option shall expire on 26 September 1989.

I also confirm receipt of a sum of RM10 as consideration for this option.

The lands referred to:

HS (D) 2363/PT 2364 measuring 27719 sq feet.

HS (D) 2364/PT 2365 measuring 14428 sq feet.

both situated in Mk 11, Seberang Perai, Tengah, Penang.

—Sgd—
(Tan Boon Seng)

It was the contention of the caveator that he had exercised both the options.

To revert to the grounds of judgment of the court below, it stated that there was no serious question for trial (in any event), and the said private caveat was (in any event) correctly removed for the following reasons.

First, the court below said that the caveator had no cause of action as between the caveator and the caveatee because there was no privity of contract. We are unable to agree; since the option was an offer, such cause of action would be dependent on the highly controversial issue as to

whether the offer was validly accepted. This would be a serious question for trial dependent on evidence and cross-examination.

The court below said that the letter of acceptance, allegedly posted by the caveator to the caveatee, was never received. Further on the issue of the sub-option, the notice of exercising the said sub-option on a woman who claimed to be the wife of the said Tan was not effective. These disputed issues, with what has been stated in the preceding paragraph, should not and could not be used by the lower court to decide the fate of the motion: see *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 (PC), ie a court should decide only on consideration of undisputed facts in affidavits and not on credibly-denied allegations in the absence of oral evidence and cross-examination, per Lord Templeman at p 436.

The court below further sought to justify the conclusion that there was no serious question for trial by stating:

> In the present case, by issuing the sub-option to caveator to buy or to sell the lands at a price of RM580,000 which was RM170,000 in excess of his mandate to sell as appeared in the option, the agent was in clear breach of his duty, as the caveator knew or must have known since he had been shown the option, right from the start, and so there was no contract resulting from the purported exercise of the sub-option by which the caveatee was bound'.

It stated, before the quoted passage, that Tan (ie the 'agent' referred to), had no authority to issue the sub-option to the caveator at a price other than the price of RM410,000 (the price mentioned in the sub-option being RM450,000).

We are unable to agree without reservations to the above view. These questions ought to be fully argued at the trial of the said civil suit by the parties in the court below, being serious questions for trial.

We are satisfied that there are indeed serious questions for trial, such questions not being frivolous or vexatious, and that the above-mentioned civil suit ought to be allowed to be heard without its being rendered futile by the removal of the private caveat in question. The private caveat ought to remain until the disposal of the said civil suit for maintaining the status quo.

We therefore allow the appeal with costs here and below, and the order of the lower court dated 28 October 1991 is hereby set aside.

Appeal allowed with costs.

Reported by TA Loh